

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1187

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1187

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES C. BASAMAN,

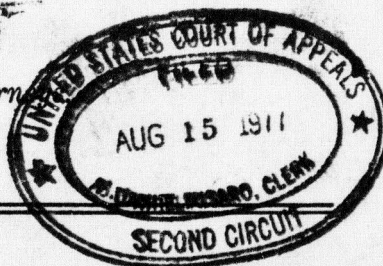
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

GREGORY L. DISKANT,
FREDERICK T. DAVIS,
*Assistant United States Attorneys
Of Counsel.*



AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Gregory L. Diskant being duly sworn deposes
and says that he is employed in the office of the United States
Attorney for the Southern District of New York.

That on the *15th* day of *August, 1977*
he served a copy of the within brief by placing the same in a
properly postpaid franked envelope addressed:

Charles C. Basaman
15 Elizabethtown Plaza
Elizabeth, N.J. 07207

And deponent further says that he sealed the said envelope and
placed the same in the mail box for mailing at the United States
Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan,
City of New York.

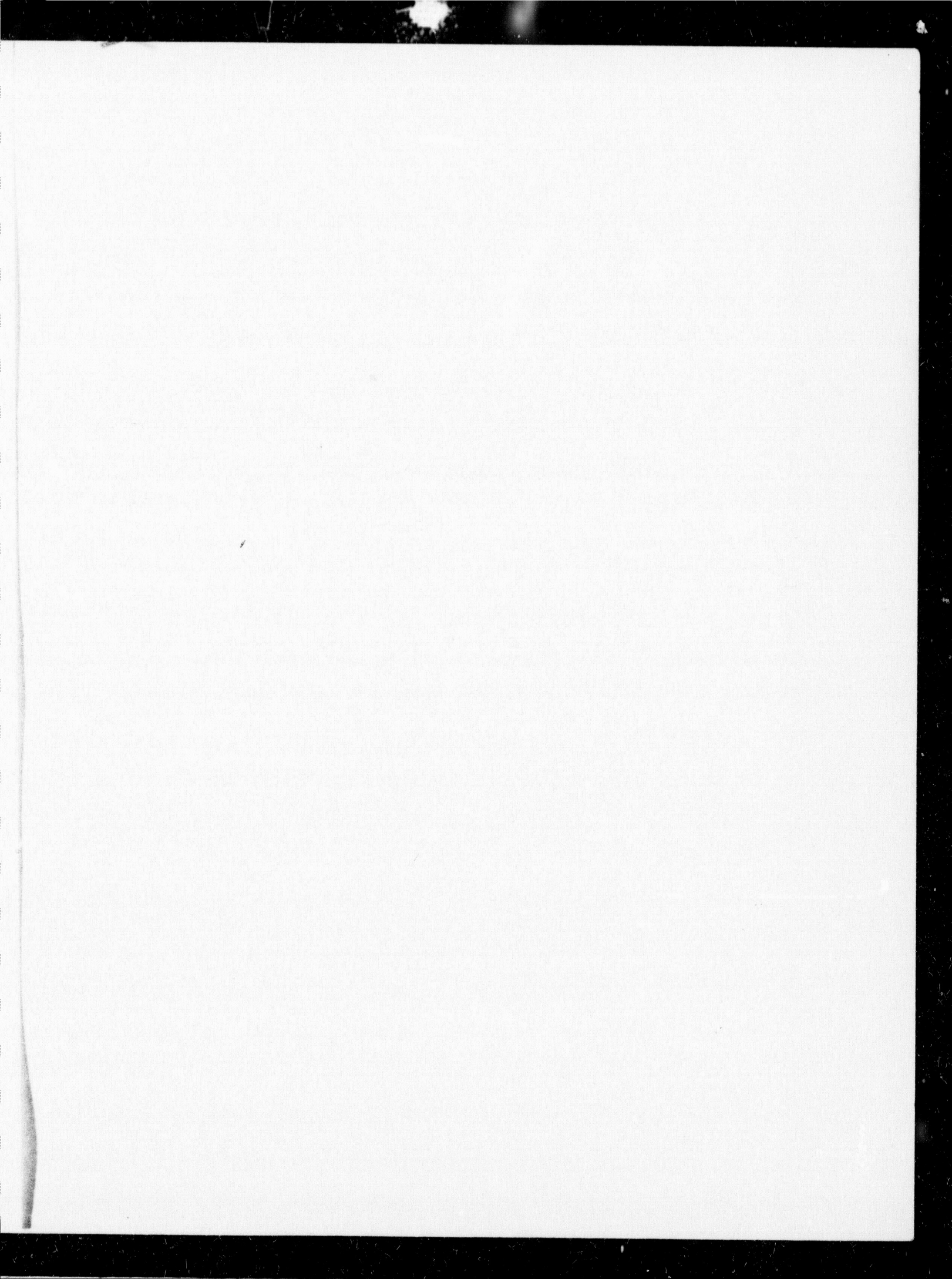
Sworn to before me this

15th day of *August, 1977*

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978

Gregory L. Diskant



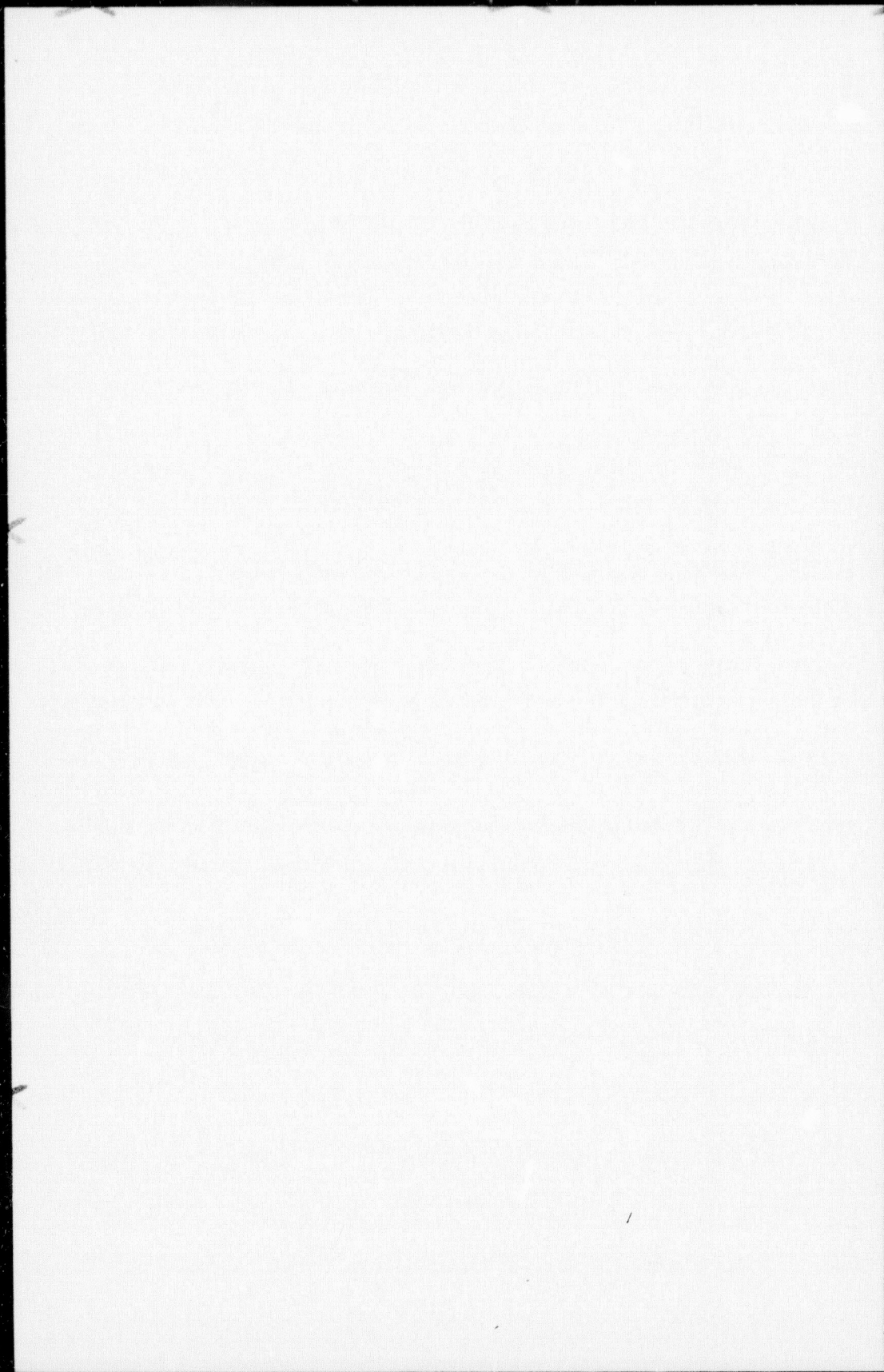


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
The Defense Case	6
ARGUMENT:	
POINT I—The Evidence was Sufficient to Support Basaman's Convictions on All Counts	6
POINT II—Basaman Was Not Denied the Effective Assistance of Counsel	8
POINT III—Basaman Was Not Denied his Constitu- tional Right to Self-representation	14
POINT IV—Basaman's Complaints About the Condi- tions of His Pre-trial Confinement Are Not Ap- pealable	17
POINT V—Basaman's Pre-Trial Motions for Release Were Properly Denied by the District Court, and Are Now Moot	17
CONCLUSION	18

TABLE OF AUTHORITIES CITED

Cases:

<i>Barnes v. United States</i> , 412 U.S. 837 (1973)	7
<i>Faretta v. California</i> , 422 U.S. 806 (1975)	14, 16

	PAGE
<i>Frishie v. Collins</i> , 342 U.S. 519 (1952)	17
<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975)	17
<i>Ker v. Illinois</i> , 119 U.S. 436 (1886)	17
<i>Johnson v. United States</i> , 506 F.2d 640 (8th Cir.), cert. denied, 420 U.S. 978 (1974)	9
<i>Moore v. United States</i> , 432 F.2d 730 (3d Cir. 1970) (en banc)	9
<i>Rickenbacker v. Warden, Auburn Correct Facility</i> , 550 F.2d 62 (2d Cir. 1976)	9
<i>Sapienza v. Vincent</i> , 534 F.2d 1007 (2d Cir. 1976) ..	16
<i>United States v. Bubar</i> , Dkt. No. 76-1140, slip op. 4519 (2d Cir. June 30, 1977)	9
<i>United States v. Catino</i> , 403 F.2d 491 (2d Cir. 1968), cert. denied sub nom., <i>Pagano v. United States</i> , 394 U.S. 1003 (1969)	17
<i>United States v. Cyphers</i> , Dkt. No. 76-1131, slip op. 1737 (Feb. 8, 1977)	16
<i>United States v. Daniels</i> , Dkt. No. 77-1071, slip op. 4579 (2d Cir. June 30, 1977)	8
<i>United States v. DeCoster</i> , 487 F.2d 1197 (D.C. Cir. 1973)	9
<i>United States v. Fessel</i> , 531 F.2d 1275 (5th Cir. 1976)	9
<i>United States v. Fitzpatrick</i> , 437 F.2d 19 (2d Cir. 1970)	13
<i>United States v. Garguilo</i> , 324 F.2d 795 (2d Cir. 1963)	9, 10
<i>United States v. Hendrix</i> , 505 F.2d 1233 (2d Cir. 1974), cert. denied, 423 U.S. 897 (1975)	10

	PAGE
<i>United States v. Hines</i> , 256 F.2d 561 (2d Cir. 1958)	7
<i>United States v. Katz</i> , 425 F.2d 928 (2d Cir. 1970)	9
<i>United States v. Medico</i> , Dkt. No. 76-1426, slip op. 3795 (2d Cir. May 25, 1977)	9
<i>United States v. Plattner</i> , 330 F.2d 271 (2d Cir. 1964)	14, 15
<i>United States v. Robinson</i> , 545 F.2d 301 (2d Cir. 1976)	7
<i>United States v. Rosner</i> , 549 F.2d 259 (2d Cir. 1977)	12
<i>United States v. Rosner</i> , 485 F.2d 1213 (2d Cir. 1973), <i>cert. denied</i> , 417 U.S. 950 (1974)	12
<i>United States v. Schipani</i> , 435 F.2d 26 (2d Cir. 1970), <i>cert. denied</i> , 401 U.S. 983 (1971)	12
<i>United States v. Seijo</i> , 537 F.2d 694 (2d Cir. 1976), <i>cert. denied</i> , 97 S.Ct. 745 (1977)	12
<i>United States v. Sweig</i> , 454 F.2d 181 (2d Cir. 1972)	12
<i>United States v. Taylor</i> , Dkt. No. 76-1210, slip op. 2805 (2d Cir. April 13, 1977), <i>cert. denied sub nom.</i> , <i>Salley v. United States</i> , 45 U.S.L.W. 3822 (June 20, 1977)	9
<i>United States v. Toney</i> , 527 F.2d 716 (6th Cir. 1975), <i>cert. denied sub nom.</i> , <i>Pruitt v. United States</i> , 97 S.Ct. 107 (1976)	9
<i>United States v. Tortura</i> , 464 F.2d 1202 (2d Cir.), <i>cert. denied</i> , 409 U.S. 1063 (1972)	12
<i>United States v. Tucker</i> , 404 U.S. 443 (1972)	12
<i>United States v. Wight</i> , 176 F.2d 376 (2d Cir. 1949), <i>cert. denied</i> , 338 U.S. 950 (1950)	9
<i>United States ex rel. Crispin v. Mancusi</i> , 448 F.2d 233 (2d Cir.), <i>cert. denied</i> , 404 U.S. 967 (1971)	9
<i>United States ex rel. Konigsberg v. Vincent</i> , 526 F.2d 131 (2d Cir. 1975), <i>cert. denied</i> , 426 U.S. 937 (1976)	15

	PAGE
<i>United States ex rel. Maldonado v. Denno</i> , 348 F.2d 12 (2d Cir. 1965), <i>cert. denied</i> , 384 U.S. 1007 (1966)	17
<i>United States ex rel. Marcelin v. Mancusi</i> , 462 F.2d 36 (2d Cir. 1972)	9
<i>United States ex rel. Martinez v. Thomas</i> , 526 F.2d 750 (2d Cir. 1975)	14, 15
<i>United States ex rel. Williams v. Twomey</i> , 510 F.2d 634 (7th Cir.), <i>cert. denied sub nom., Sielaff,</i> <i>Corrections Director v. Williams</i> , 423 U.S. 876 (1975)	9
<i>Wojtowicz v. United States</i> , 550 F.2d 786 (2d Cir. 1977)	9

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1705	1, 7
18 U.S.C. § 1708	1, 7
18 U.S.C. § 3146	17
18 U.S.C. § 3147	18
18 U.S.C. § 3568	12
18 U.S.C. § 4202	12
18 U.S.C. § 4244	1, 10
18 U.S.C. § 4246	2
28 U.S.C. § 1983	17
28 U.S.C. § 2241	17

MISCELLANEOUS

Federal Rules of Criminal Procedure, Rule 32(c) ..	10
Federal Rules of Criminal Procedure, Rule 43 ...	12, 13

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1187

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES C. BASAMAN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Charles C. Basaman appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on March 21, 1977, after a two day trial before the Honorable Lloyd F. MacMahon, United States District Judge, sitting without a jury.

Indictment 76 Cr. 974, filed October 20, 1976, charged Charles C. Basaman in Count One with breaking into a letter box in violation of Title 18, United States Code, Section 1705, and in Counts Two and Three with possession of stolen mail in violation of Title 18, United States Code, Section 1708.

A competency hearing was held on January 3, 1977 pursuant to Title 18, United States Code, Section 4244. Basaman was declared incompetent to stand trial at that time, and was sent to the United States Medical Center

for Federal Prisoners at Springfield, Missouri (the Medical Center) for further observation and examination, pursuant to Title 18, United States Code, Section 4246. Basaman was found to be competent by the Medical Center and was returned to the Southern District of New York for trial.

A suppression hearing was held on March 17, 1977, and the trial commenced immediately thereafter, the defendant having waived a jury. The trial ended on March 18, 1977, when Judge MacMahon found Basaman guilty on all three counts.

Basaman waived a pre-sentence examination, and on March 21, 1977, Judge MacMahon sentenced Basaman to two years imprisonment on each count, to be served concurrently. Basaman is currently serving his sentence.

Statement of Facts

The Government's Case

In late September 1976, residents of the 100 block of West 58th Street in Manhattan began to suffer a rash of break-ins of their letter boxes. Alfred Buttler, of 132 West 58th Street, Apartment 5F, noticed that his letter box was broken into every day for a week. He complained to the United States Postal Inspection Service and placed pieces of "dummy" mail in the letter box to determine if it would be broken into again. Elliot Martin, of 152 West 58th Street, discovered that his mailbox had been pried open, as well as seven or eight other mailboxes in his building, on more than one occasion. He also complained to the Postal Inspection Service. (Tr. 188-89, 195-97, 207).*

* The designation "Tr." refers to the trial transcript; the designation "GX" refers to Government exhibits received at trial; the designation "DX" refers to defense exhibits received at trial.

On September 24, 1976, Special Investigator William Henehan of the Postal Inspection Service learned from the owner of a clothing store in the 100 block of West 58th Street that a man who lived on that block and whose description was later found to match Charles C. Basaman's had recently attempted to purchase clothing with a stolen American Express credit card. Later that same day Henehan's partner, Chester F. Petrosky, observed a man of the same description walk up 58th Street and enter 132 West 58th Street. (Tr. 26-28).*

As soon as Henehan completed a telephone call he was making, he and Petrosky followed the man, later identified as Charles C. Basaman, into 132 West 58th Street. In the lobby, they found Basaman, with a butter knife and a screwdriver in hand (GX 1, 2), holding open the lid of Alfred Buttler's letter box. Basaman was holding two pieces of "dummy" mail that Buttler had earlier placed in the letter box. (GX 25; DX G). He had in his possession a shopping bag, which contained, *inter alia*, two broken letter box locks and an unopened letter addressed to a resident of 150 West 58th Street. (GX 4, 5, 6). Henehan asked Basaman what he was doing; Basaman said he was getting his mail. (Tr. 16, 28-29, 146-49, 160, 197).

Henehan and Petrosky placed Basaman under arrest and advised him of his constitutional rights. They learned that he lived in Apartment 2F at 132 West 58th Street, and asked permission to search his apartment. Basaman readily agreed, and signed a consent to search form provided by the postal agents. (GX 3). In the apartment, the agents found numerous pieces of mail

*It was stipulated by the parties, at Basaman's request, that evidence taken at the suppression hearing on March 17, 1977, be incorporated by reference as evidence taken at trial. (Tr. 145). Accordingly, citations herein will be to testimony taken both at the suppression hearing and at the trial.

addressed to various residents of West 58th Street. (GX 7-10; Tr. 16-18, 29-31, 150-51).

Among the mail found was an American Express bill addressed to Elliot Martin. (GX 13). The bill had been placed in the mail by American Express on September 17, 1976, and had never been received by Elliot Martin. The American Express number printed on Martin's bill had been used to order merchandise, in Martin's name, to be sent to Basaman's address.* (GX 18; Tr. 177-79, 186-87, 189-92, 205-06).

Later on September 24, 1976, after again being advised of his constitutional rights and after signing a *Miranda* warning and waiver form (GX 14), Basaman made oral and written admissions to Postal Inspector Frank Marion. Basaman admitted to having broken into letter boxes at various addresses on West 58th Street, including numbers 132, 135, 150 and 152, and to having used credit card numbers obtained from stolen mail to order merchandise. Basaman wrote in part:

"Today . . . I returned to my residence at approximately 4:15 p.m. I went to my room, apartment 2F, picked up a shopping bag and a screwdriver, went downstairs to the mailboxes and took the screwdriver and popped open mailbox 5F and removed 2 pieces of mail . . . I have broken mailboxes at 150, 152, and 135 and 132 W. 58th St. on a number of occasions in the last week. . . ." (GX 15A).

(Tr. 57-58, 207-08, 210-11).

* Alfred Buttler had also not received his September 1976 American Express bill. His American Express credit card number been used to order gold coins to be sent to Basaman's address. (GX 27; Tr. 199-202).

Within a week after Basaman's arrest, the Postal Inspectors began receiving new complaints about letterbox break-ins on West 58th Street. On October 4, 1976, Henehan and Petrosky returned to West 58th Street to visit Basaman. They knocked on the door to Apartment 2F, but received no answer, although they heard someone moving around inside. The agents left the building. Henehan telephoned Frank Marion, who in turn telephoned Basaman. Basaman told Marion that the agents could come up, but only if they would wait 5 or 10 minutes. While the agents waited, Petrosky looked from the street into Basaman's second floor window. He could see him walking back and forth in the apartment in the direction of what he later learned was Basaman's closet. (Tr. 19-20, 226-27).

Thereafter, Henehan and Petrosky returned to Apartment 2F and knocked on the door. Basaman admitted them. Again, the agents asked for permission to search, and again Basaman agreed, signing another consent to search form. (GX 11). Henehan looked into Basaman's closet and began to look through a suitcase he found there. Basaman told Henehan the suitcase was full of dirty clothes and, since Henehan did see dirty clothes on top, he stopped searching the suitcase. Later Petrosky went through the same suitcase. On the bottom of the suitcase, he found a wallet wrapped in clothing. Inside the wallet were four plastic cards, including a Citibank Citicard in the name of Linda Gayle Smith, of 120 West 58th Street. (GX 16). The Citicard had been mailed by Citibank to Linda Gayle Smith on September 28, 1976, after the date of Basaman's first arrest, and had never been received by Smith. (Tr. 19-21, 152-54, 166-67, 172-74, 227-28).

The Defense Case

Charles C. Basaman did not call any witnesses or testify on his own behalf.*

ARGUMENT

POINT I

The Evidence was Sufficient to Support Basaman's Convictions on All Counts.

Basaman was charged, in Count One, with breaking into Alfred Buttler's mail box; in Count Two, with possessing Elliot Martin's American Express bill, knowing it to be stolen; and in Count Three, with possessing Linda Gayle Smith's Citicard, knowing it to be stolen. As the District Court correctly concluded, the evidence

* Basaman did testify at the suppression hearing on the admissibility of his statements and of the evidence seized on September 24 and October 4, 1976. He claimed that, when arrested on September 24, 1976, he had been removing mail from his own letter box (for Apartment 2F); that he was not then in possession of Buttler's dummy mail; that he had opened the letter box with his key; that he was holding a kitchen knife which he had picked off the floor, but that he did not have a screwdriver in his possession; and that he was not then in possession of the shopping bag. He conceded that he had thereafter invited the postal agents up to his apartment and that he told them in the apartment "you can do whatever you want," (Tr. 91), but claimed that he had not signed the consent to search form until the agents had been in his apartment for an hour. Basaman further testified under oath that Inspector Marion had dictated his written statement to him and that the information contained therein was not true. With respect to the search on October 4, 1976, Basaman conceded that he told the postal agents "go ahead and look" (Tr. 100-01), but claimed that he did not sign the consent to search form until he had been arrested and removed from the apartment (Tr. 77-80, 90-106, 111-14, 116).

against him on all three counts was "overwhelming" and "immutable." (Tr. 307, 309).

With respect to Count One, charging a violation of 18 U.S.C. § 1705, the Government was obligated to prove (1) that Basaman injured, destroyed or broke open a letter box used for the receipt of mail for Apartment 5F, 132 West 58th Street, New York, N.Y.; and (2) that he did so maliciously or wilfully. Both conclusions are inescapable from the evidence: Basaman was found holding open the letter box for Apartment 5F; he had burglar tools in his hands; he was holding the contents of the letter box for Apartment 5F; he admitted to breaking into the letter box in writing; Buttler always locked his letter box; Basaman was in possession of broken letter box locks at the time of his arrest; Buttler's letter box had been broken into repeatedly during the prior week; and Basaman admitted to breaking into letter boxes at 132 West 58th Street repeatedly over the preceding several weeks. Judge MacMahon found Basaman guilty on Count One. (Tr. 273-75).

With respect to Counts Two and Three, charging violations of 18 U.S.C. § 1708, the Government was obligated to prove (1) that the letter charged was stolen from the mails; (2) that Basaman possessed it on or about the date charged; and (3) that he possessed it knowing it was stolen. See *United States v. Hines*, 256 F.2d 561, 563 (2d Cir. 1958); compare *Barnes v. United States*, 412 U.S. 837, 847 (1973); *United States v. Robinson*, 545 F.2d 301, 303-04 (2d Cir. 1976). Again, the finding of guilt was inevitable. As to Elliot Martin's American Express bill, the District Court relied upon the following facts: the bill was deposited in the mail by American Express; it was never received by Elliot Martin; Elliot Martin's letter box at 152 West 58th Street was broken into several times over the preceding several weeks; Basaman admitted orally and in writing to breaking into letter boxes at 152 West 58th Street; the bill was

found in Basaman's apartment on September 24, 1976; merchandise had been ordered under Elliot Martin's American Express card number and Basaman's address; and Basaman admitted ordering merchandise with credit card number obtained from stolen mail. (Tr. 275-79).

Likewise, with respect to Linda Gayle Smith's Citicard, the facts were clear: the Citicard was placed in the mail by Citibank; the Citicard was never received by Linda Gayle Smith; the Citicard was found in Basaman's apartment on October 4, 1976; the card was found concealed under a pile of clothes in a suitcase in a closet to which Basaman was observed going after he knew the Postal Inspectors wished to speak with him; and Basaman attempted to prevent the discovery of the card by stating that the suitcase contained only dirty clothes. Judge MacMahon found Basaman guilty on Count Three. (Tr. 275-76, 279-81).

POINT II

Basaman Was Not Denied the Effective Assistance of Counsel.

Basaman, who pursues this appeal *pro se*, claims he was denied the effective representation of counsel because his appointed counsel, a member of the Legal Aid Society, (1) insisted on exploring the possibility of an insanity defense; (2) refused to call Basaman to the stand as a witness in his own defense; (3) waived a pre-sentence report; and (4) failed to obtain permission for Basaman to absent himself from the trial. The very acts complained of, in and of themselves, demonstrate the *competence* of Basaman's trial counsel.

Like *United States v. Daniels*, Dkt. No. 77-1071, slip op. 4579, 4585 (2d Cir. June 30, 1977); *United States v. Medico*, Dkt. No. 76-1426, slip op. 3795, 3812 & n. 15

(2d Cir. May 25, 1977); *United States v. Taylor*, Dkt. No. 76-1210, slip op. 2805, 2829 (2d Cir. April 13, 1977), *cert. denied sub nom. Salley v. United States*, 45 U.S.L.W. 3822 (June 20, 1977), and *Rickenbacker v. Warden, Auburn Correct. Facility*, 550 F.2d 62, 66 (2d Cir. 1976), this is not a case that need cause reconsideration of the traditional "farce and mockery" standard of incompetence of counsel. *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). Under the traditional standard or under any of the more liberal standards used in other circuits for assessing incompetence of counsel, see *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973); *Moore v. United States*, 432 F.2d 730, 736 (3rd Cir. 1970) (*en banc*); *United States v. Fessel*, 531 F.2d 1275, 1278 (5th Cir. 1976); *United States v. Toney*, 527 F.2d 716, 720 (6th Cir. 1975), *cert. denied sub nom.*, *Pruitt v. United States*, 97 S. Ct. 107 (1976); *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied sub nom. Sielaff, Corrections Director v. Williams*, 423 U.S. 876 (1975); *Johnson v. United States*, 506 F.2d 640, 646 (8th Cir.), *cert. denied*, 420 U.S. 978 (1974), Basaman's trial counsel more than adequately represented him at trial.

Counsel would have been remiss in his obligation had he not explored the possibility of an insanity defense. In light of the Government's evidence,* Basaman's only possible defense—if he failed to have the evidence suppressed—was that of insanity. *Cf. Wojtowicz v. United States*, 550 F.2d 786, 792 (2d Cir. 1977). Counsel's

* "In evaluating a claim of ineffective assistance of counsel, our Court usually has started by examining the strength of the prosecution's case." *United States v. Bubar*, Dkt. No. 76-1140, slip op. 4519, 4537 n.15 (2d Cir. June 30, 1977), citing *United States ex rel. Marcellin v. Mancusi*, 462 F.2d 36, 43-44 (2d Cir. 1972); *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233, 234 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); *United States v. Katz*, 425 F.2d 928, 930 (2d Cir. 1970); *United States v. Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963).

conscientious efforts to obtain examinations of the defendant under 18 U.S.C. § 4244 are to be commended, rather than assailed.

Likewise, counsel's refusal to call Basaman as a witness in his own defense can hardly be faulted. Such decisions are always tactical ones that an appellate court should not attempt to secondguess. *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963). In light of Basaman's wholly incredible testimony at the suppression hearing, see p. 6, n. *, counsel may well have deemed it advisable to avoid any further testimony by his client at trial, and so to minimize the possibility that such testimony would be found perjurious and taken into account by the judge at the time of the all-but-inevitable conviction and sentencing. See *United States v. Hendrix*, 505 F.2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975).

Moreover, in view of Basaman's statements at the time of sentencing, at which time Basaman apparently presented his own notions of his defense, counsel may also have concluded that Basaman's defense theories were so untenable that they would have distracted from and undercut counsel's own efforts to win an essentially technical acquittal by demonstrating that the Government had inadequately preserved the evidence of Basaman's guilt.* See pp. 13-14, *infra*.

Counsel's decision to waive a pre-sentence report was equally proper. Waiver of a pre-sentence report is, of course, permitted under the rules. Fed. R. Crim. P. 32(c)

* At sentencing Basaman informed the Court of his belief that his crimes had been committed "with the full consent and knowledge of the United States Postal Inspectors Service," in order to prove to the Inspectors, and to a Detective Beecher of the Manhattan District Attorney's Office, that "it can be done," that "a dumb thief like me can take you and rip you off for every dollar that you got. . . ." (Tr. 300-01; see also Tr. 303-04).

(1).^{*} Here counsel's decision to waive a report was made for adequate reasons well reflected on the record:

"Your Honor, might I ask the Court whether it would consider waiving a presentence report here? I think Mr. Basaman's whole life is by now just about known to this Court. He has been examined by three psychiatrists. Your Honor has their reports. His rap sheet is available to the Court. I don't know if you have seen it yet. I have it. I am sure the Government can turn a copy over to you.

"You know of his background. You know of his condition. You have observed him. You have spoken to him at length many times over the months and frankly I doubt very much that a probation officer could add very much of value for your Honor's consideration on the issue of sentence." (Tr. 282).

The reasons stated by defense counsel were themselves more than adequate to justify the request for a waiver. But another unstated reason undoubtedly entered into counsel's reasoning. At the time of trial, Basaman had been in pretrial detention for a period of 161 days, most of which time had been consumed with psychiatric examinations. Counsel was undoubtedly hopeful that Basaman would be sentenced to time-served—indeed he requested as much on the date of sentencing. (Tr. 299). If such was to be Basaman's sentence, it is obvious that it would be against Basaman's interest to be further incarcerated while a pre-sentence examination was prepared. Moreover, counsel surely also considered the fact that even if Basaman received a longer prison term, the more than

^{*} Accordingly, to the extent Basaman claims that the trial court erred in sentencing him without such a report, his claim is utterly frivolous.

five months he had already served would make him immediately eligible for parole if he received a sentence of 15 months or less. See 18 U.S.C. §§ 3568, 4202. In that eventuality, as well, it was in Basaman's interest to waive a pre-sentence report.

Accordingly, for the reasons stated and unstated, counsel's waiver of a pre-sentence report was a sound tactical decision, and one that does not show any incompetence.*

Basaman's last specific complaint about trial counsel's behavior concerns his inability to secure for Basaman permission to absent himself from the trial on its second, and concluding, day. Basaman prevailed upon counsel to make a request, purportedly under Rule 43 of the Rules of Criminal Procedure, to leave the trial. (Tr. 184). The Court promptly refused the request. (Tr. 185-86). Counsel's inability to convince the Court to allow Basaman's

* To the extent Basaman's complaint is directed not at the waiver of the pre-sentence report, but at the Government's presentation at the time of sentence of additional material related to Basaman's criminal behavior, his complaint is ill-founded. First, Judge MacMahon expressly refused to rely on the Government's presentation in sentencing Basaman. (Tr. 307-08). In any event, however, the Government's presentation was permissible. Defense counsel had notice of exactly the materials that the Government intended to present to the court at the time of the sentence and had an opportunity to rebut any incorrect information. (Tr. 285-87, 292-96). Cf. *United States v. Rosner*, 549 F.2d 259 (2d Cir. 1977); *United States v. Rosner*, 485 F.2d 12-13 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974). That being the case, the trial judge was permitted, if he chose, to rely on the information presented. *United States v. Tucker*, 404 U.S. 443, 446 (1972); *United States v. Seijo*, 537 F.2d 694, 700 n.7 (2d Cir. 1976), cert. denied, 97 S. Ct. 745 (1977); *United States v. Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972); *United States v. Tortora*, 464 F.2d 1202, 1208 n.4 (2d Cir.), cert. denied, 409 U.S. 1063 (1972); *United States v. Schipani*, 435 F.2d 26, 27 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971).

departure can hardly be faulted, for the claim itself is utterly frivolous and a perversion of Rule 43.

Rule 43 permits a trial, once begun, to proceed even if the defendant absconds. The rule does not purport to create a *right* for defendants to absent themselves from their trials. *United States v. Fitzpatrick*, 437 F.2d 19, 27 (2d Cir. 1970). Indeed, the very part of Rule 43 upon which Basaman relies makes clear that the defendant's duty is to remain at his trial. Subdivision (b)(1) permits a trial to proceed when a defendant, initially present, "voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of *his obligation to remain during the trial*), . . ." (emphasis added).*

In sum, Basaman has failed to identify a single instance of even an unwise strategy decision by his counsel, let alone mistakes of such magnitude as to rise to a constitutional level of incompetence. To the contrary, counsel's own decisions with respect to the conduct of the trial were beyond reproach. He recognized the importance of, and energetically pursued, motions to suppress the evidence and statements taken from the defendant. (Tr. 15-144). When these motions were lost, counsel identified the only remaining weakness in the Government's case—the fact that because of the sheer volume of stolen mail recovered by the agents from Basaman's apartment, the agents had neglected to initial each piece for identification as carefully as good practice requires. Counsel's aggressive questioning of the agents with respect to their in-court identification of pieces of evidence succeeded in having one piece of Government evidence stricken. (Tr.

* To the extent Basaman asserts, as an independent ground of appeal, that the trial court committed reversible error by refusing to allow him to absent himself from his trial, that claim is frivolous for the reasons just stated. *United States v. Fitzpatrick*, 437 F.2d 19, 27 (2d Cir. 1970).

161-63; See also Tr. 229-36). It also resulted in careful questioning and reflection by the Court about the remaining evidence and identifications (Tr. 230, 253-54, 256, 262-63), as well as sharp words from the Court towards the agents' sloppy practice. (Tr. 236). While the defense tactic did not succeed, given the recognizable nature of most of the Government's evidence (Tr. 275-77), it was the only remaining tactic with any possibility of success, and it won defense counsel words of high praise from the trial court. At the conclusion of the trial, Judge MacMahon complimented defense counsel as follows:

"I want to thank you, Mr. Thau, for your very able presentation of a very difficult case. I have had you before me many, many times over the years, and I have never seen you so brilliantly cross-examine witnesses as you did in this case, or expose whatever weaknesses were there as well as you did, and your performance is rare, indeed, in this court." (Tr. 288-89).

See also Tr. 307, 310. On this record, Basaman's claim of ineffective assistance of counsel is simply a slander on an able defense attorney.

POINT III

Basaman was Not Denied his Constitutional Right to Self-representation.

"The right to counsel and the right to defend *pro se* in criminal cases form a single, inseparable bundle of rights, two faces of the same coin." *United States v. Plattner*, 330 F.2d 271, 276 (2d Cir. 1964). See also *Faretta v. California*, 422 U.S. 806 (1975); *United States ex rel. Martinez v. Thomas*, 526 F.2d 750 (2d Cir. 1975); *United States ex rel. Konigsberg v. Vincent*, 526 F.2d

131 (2d Cir. 1975), *cert. denied*, 426 U.S. 937 (1976). Nonetheless, because a lawyer, with his special skill and training, is widely regarded as the preferable, if not essential, foundation for a successful defense, a court cannot permit a defendant to proceed *pro se* without careful inquiry into his understanding of his decision to represent himself. The inquiry should include advising the defendant that the trial judge himself thinks it is in the best interests of the defendant to have a lawyer. *United States v. Plattner*, *supra*, 330 F.2d at 276; *United States ex rel. Martinez v. Thomas*, *supra*, 526 F.2d at 755.

Accordingly, while the right to counsel and the right to proceed *pro se* may be opposite sides of the same coin, representation by counsel is the preferred practice in our system, and no court has ever held that any inquiry of a defendant is required before he exercises his right to be represented by counsel.

In this case, prior to trial, Basaman suggested his interest in proceeding *pro se* and the Government prepared for the Court, in compliance with the cases cited above, a proposed examination into Basaman's decision to proceed *pro se*. Nonetheless, on the date of trial Basaman withdrew his request to proceed *pro se* and requested to be represented by appointed counsel.

"THE COURT: Mr. Basaman, all I ask you is whether you wish to represent yourself or whether you wish to be represented by a court-appointed lawyer, Mr. Thau, who has devoted many hours to your case, and who is thoroughly familiar with it.

You have the right to be represented by yourself. That is, if you wish to be represented by yourself.

"THE DEFENDANT: If that is the Court's position, I will withdraw. . . . So I told Mr. Thau

that I have nothing against him, and I appreciate [it] if he takes the case, and I withdraw my application to you." (Tr. 8-9).

See also Tr. 2-7. The defendant having agreed to representation by counsel, no further inquiry by the Court was necessary.

After consenting to being represented by counsel, Basaman did not attempt to alter that decision during the trial. To the contrary, he cooperated with defense counsel throughout the trial, and suggested lines of questioning for him. (Tr. 47, 116, 132, 136, 184). Indeed, Basaman trusted counsel's conduct of the trial sufficiently that he asked to be excused while the trial was in progress. (Tr. 184).

It was only after the trial was over and Basaman had been convicted that he again began to assert his right to represent himself. Thus, at sentencing Basaman complained, "I want to say, your Honor, right through (sic) the beginning I asked to represent myself." (Tr. 300).

Basaman cannot have it both ways. *United States v. Cyphers*, Dkt. No. 76-1131, slip op. 1737, 1743 (Feb. 8, 1977). He asked for counsel at trial, and he was given counsel. He cannot now be heard to assert that he did not really wish to be represented by counsel. Basaman's claim that he was denied his right to proceed *pro se* is completely without support in the record and should be rejected.

Indeed, as this Court has held both before and after the *Faretta* decision, a defendant does not have an absolute right to divest himself of his attorney after the commencement of the trial. *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976); *United States ex rel. Mal-*

donado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); *United States v. Catino*, 403 F.2d 491, 497 (2d Cir. 1968), *cert. denied sub nom.*, *Pagano v. United States*, 394 U.S. 1003 (1969).

POINT IV

Basaman's Complaints About the Conditions of His Pre-trial Confinement Are not Appealable.

Basaman's complaints about the conditions of his pre-trial confinement, even if true, do not form a basis for appeal from his subsequent conviction.* "[I]llegal arrest or detention does not void a subsequent conviction." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). See also *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 110 U.S. 436 (1886). Such complaints have nothing whatsoever to do with Basaman's guilt or innocence, and have no bearing on the validity of his conviction. They should be disregarded by this Court.

POINT V

Basaman's Pre-Trial Motions for Release Were Properly Denied by the District Court, and Are Now Moot.

Basaman filed various pre-trial motions, variously styled petitions for habeas corpus, and motions for release. All were in the nature of motions for bail pursuant to 18 U.S.C. § 3146. (Tr. 181-82). Although he was originally released on bail, Basaman's bail was revoked

* Of course, if warranted, Basaman may obtain relief under 28 U.S.C. § 1983, and, if the alleged conditions still continue, under 28 U.S.C. § 2241.

because he demonstrated he was not a good bail risk by failing to keep in touch with his attorney when he was out on bail. Moreover, it was necessary to keep him in custody in order to perform the various psychiatric examinations that were ordered. These reasons, stated on the record by Judge MacMahon, were sufficient to justify the revocation of Basaman's bail. (Tr. 311). No timely appeal from the revocation of bail was taken pursuant to 18 U.S.C. § 3147.

Since Basaman has now been convicted of the charges against him, the question of pre-trial bail is moot, and Judge MacMahon correctly dismissed any remaining petitions for release on that ground.* (Tr. 310-11). This Court should not entertain them now.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

GREGORY L. DISKANT,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

* Judge MacMahon also denied Basaman bail pending appeal. Basaman did appeal that denial of bail, which this Court (Lumhard, Anderson, Oakes, C.J.J.), affirmed by order dated June 22, 1977.

